Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

COMMENTS OF AT&T WIRELESS SERVICES, INC.

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COMMENTS OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. ("AWS") hereby submits its comments in response to the Commission's Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

In light of the Tenth Circuit's decision in U.S. West, Inc. v. Federal Communications Commission[2/] to vacate the Commission's original customer consent requirements, the Commission seeks further comment on methods carriers can utilize to obtain consent to use customer proprietary network information ("CPNI"). AWS supports the use of an "opt out" consent mechanism. Permitting carriers to use an opt out consent mechanism is a common sense

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1/ In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket Nos. 96-115 and 96-149, Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247 (Sept. 7, 2001) ("Further Notice").

2/ 183 F.3d 1224 (10th Cir. 1999).

approach that will protect consumer privacy, ensure consistency with other regulatory schemes, and avoid the imposition of unnecessary burdens on carriers. Moreover, only opt out consent satisfies the constitutional requirements regarding restrictions on commercial speech and is consistent with the Commission's total service approach.

DISCUSSION

I. "OPT OUT" CONSENT WILL APPROPRIATELY SAFEGUARD CUSTOMER PRIVACY

The Commission asks for comment on methods of obtaining customer consent that would serve the governmental interests at issue, ensure that customers are able to provide informed consent, and also satisfy the constitutional requirement that any restrictions on speech be narrowly tailored.[3/] AWS believes that the Commission should provide carriers with maximum flexibility to determine how best to obtain consent, consistent with the requirements of section 222 of the Communications Act.[4/] Such flexibility is justified in light of the substantial marketplace incentives for AWS and other wireless carriers to safeguard customer privacy. In the competitive wireless marketplace, customers demand that their sensitive information be protected. They can and will choose to utilize only those carriers who meet their high expectations regarding the collection, use, and security of their proprietary information. In compliance with the law and as a matter of sound business practices, AWS will act aggressively to ensure that these expectations are met.

As part of an overall scheme to ensure the privacy of CPNI, AWS supports the use of an "opt out" mechanism for obtaining customer approval before using CPNI to provide

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[3/] Further Notice at ¶ 12.

[4/] 47 U.S.C. § 222.

telecommunications services other than those from which the CPNI is derived.[5/] Carriers using an opt out mechanism would inform customers of their rights regarding the use of their CPNI, including their right to limit use of their CPNI and the precise steps they need to take to limit such use. As the Commission has proposed, the carrier would also provide each customer with a "reasonable and convenient" means of opting out,[6/] for example by sending their name and billing information to the carrier by U.S. mail. Any customer that cares about how his or her CPNI is used will be able to utilize these reasonable and convenient means to limit its use.

AWS agrees that there should be a reasonable waiting period between the time notice is provided and consent is assumed, and supports the 30-day waiting period proposed by the Commission.[7/] After this time period has passed, the carrier can assume that it has consent to use the customer's CPNI to market services other than those from which the CPNI was derived. However, even after the 30-day period, customers will have the ability to notify their carrier that their position has changed. Carriers will have to develop appropriate methods to ensure that the customer's most recent communication on use of their CPNI is honored, regardless of the format of that communication.[8/]

Requiring the use of an "opt in" consent mechanism would impose a much greater burden on carriers, but it would not provide substantially more privacy protection for customers. Carriers using an opt in mechanism must wait for their customers to take affirmative action. A

[5/] 47 U.S.C. § 222(c)(1). To determine which service is the one from which the CPNI is derived, the Commission uses a "total service approach." AWS agrees with the Commission that the Tenth Circuit did not invalidate this portion of the Commission's rules and that the total service approach is a reasonable interpretation of section 222(c)(1). See discussion infra at Section III.

[6/] Further Notice at ¶ 9.

[7/] See id. at ¶¶ 9, 11, 23.

[8/] Id. at ¶ 23.

carrier would not know whether the absence of such affirmative action reflects a conscious decision by the customer not to permit the carrier to use his or her CPNI, or simply a lack of interest. If it is the former, the carrier risks annoying the customer by taking additional steps to obtain consent to use his or her CPNI. If it is the latter, the carrier must expend additional time and resources attempting to obtain the consent of a customer who may not be concerned about what happens to his or her CPNI. Despite these additional burdens on customers as well as carriers, use of an opt in mechanism does not provide the customer with significantly greater control over his or her CPNI compared to an opt out solution. Under either approach, customers can take simple steps to ensure that their CPNI is not used in a manner that they do not want.

As the Commission recognizes,[9/] opt out consent mechanisms have been incorporated in other federal regimes governing the disclosure of personal information. For example, pursuant to the Gramm-Leach-Bliley Act,[10/] financial institutions use an opt out mechanism to obtain consent to share nonpublic personal information about consumers with non-affiliated third parties. Similarly, under the Federal Trade Commission's regulations governing the sharing of credit data among affiliates,[11/] an institution may share this information if it has provided the consumer with an opportunity to opt out.[12/] A number of recent legislative proposals also utilize opt out mechanisms to protect proprietary consumer information.[13/]

[9/] Id. at ¶ 16.

[10/] Title V, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

[11/] These regulations implement the Fair Credit and Reporting Act, 15 U.S.C. § 1681, et. seq., as amended by the Consumer Credit Reporting Reform Act of 1996, Pub. Law 104-208; 110 Stat. 3009-1257.

[12/] See generally Fair Credit Reporting Act Interpretations: Proposed Interpretations, 16 C.F.R Part 600.

[13/] See, e.g., the Consumer Internet Privacy Enhancement Act, S. 2928, 106th Cong. (2000) (prohibiting commercial web site operators from collecting certain personally identifiable

The Commission asks what effect, if any, the enactment of current section 222(f) should have on the Commission's interpretation of section 222(c).[14/] Section 222(f) requires carriers to obtain the "express prior authorization of the customer" in order to use, disclose, or provide access to certain types of location information, except in specified emergency circumstances.[15/] In contrast to the "approval" requirement in section 222(c)(1), which applies to all CPNI, the "express prior authorization" requirement of section 222(f) applies only to location information.[16/] Section 222(f) was adopted in order to address concerns that "new ever-more sophisticated location technology permits wireless carriers a greater ability to physically pinpoint the geographic location of the caller, … [which] poses privacy issues that must be dealt with."[17/] As a narrowly tailored response to such specific concerns, it does not affect the Commission's present inquiry regarding the form of consent required before a carrier can use other (i.e., non-location) CPNI to provide services other than those from which the CPNI is derived.

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information unless the operator provides users with notice and an opportunity to limit the use of that information for marketing purposes or its disclosure to third parties); Consumer Internet Privacy Enhancement Act, H.R. 237, 107th Cong. (2001) (prohibiting commercial web site operators from collecting certain personally identifiable information unless the operator provides users with notice and an opportunity to limit the use of that information for marketing purposes or its disclosure to third parties); the Consumer Online Privacy and Disclosure Act, H.R. 347, 107th Cong. (2001) (directing the FTC to adopt regulations that require web site operators to provide individuals with a simple online process to opt out of the disclosure of personal information); the Privacy Act of 2001, S. 1055, 107th Cong. (2001) (requiring commercial entities to notify individuals of their ability to restrict the sale or disclosure of their personal information to non-affiliated third parties).

[14/] Further Notice at ¶ 22. Current section 222(f) was added by the Wireless Communications and Public Safety Act of 1999 (the "911 Act").

[15/] 47 U.S.C. § 222(g).

[16/] As AWS explained in its comments in response to the petition of the Cellular Telecommunications & Internet Association for a rulemaking to establish fair location information practices, given the nascent state of location services, inter alia, it would be premature for the Commission to adopt rules regarding location information at this time. Comments of AT&T Wireless Services, Inc., WT Docket No. 01-72 (filed April 6, 2001).

II. ONLY AN OPT OUT APPROVAL MECHANISM SERVES THE GOVERNMENTAL INTERESTS AT ISSUE AND SATISFIES THE CONSTITUTIONAL REQUIREMENTS OF CENTRAL HUDSON

In light of the Tenth Circuit's decision in U.S. West, Inc. v. Federal Communications Commission[18/] to vacate the Commission's original customer consent requirements, the Commission seeks comment on how such requirements can be crafted to satisfy the statutory requirements of section 222, while accommodating constitutional limitations on restrictions on commercial speech.[19/] The Tenth Circuit found that the Commission's CPNI regulations restrict a carrier's ability to speak with its customers.[20/] Restrictions on commercial speech are constitutionally sound only if the government meets the requirements of the test set forth in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.[21/] Under this test, an initial inquiry is conducted as to whether the speech is lawful and not misleading.[22/] If this requirement is met, as it is in the CPNI context,[23/] the government may regulate the speech only if it demonstrates that "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve that interest."[24/] As discussed below, only opt-out consent satisfies the Central Hudson test.

17/ 145 Cong. Rec. H9860 (daily ed. Oct. 12, 1999) (statement of Rep. Markey).

18/ 183 F.3d 1224 (10th Cir. 1999).

19/ Further Notice at ¶ 12.

20/ U.S. West at 1232.

21/ 447 U.S. 557 (1980).

22/ Id. at 566.

23/ No party asserts that the communications in issue between carriers and customers regarding telecommunications services are unlawful or misleading. See U.S. West at 1233.

24/ Id. at 564-65.

In its initial CPNI Order,[25/] the Commission identified two substantial governmental interests associated with the statutory CPNI restrictions: "protecting the privacy of consumers and protecting fair competition."[26/] Despite the reservations expressed by the Tenth Circuit in U.S. West, AWS agrees with the Commission that the government has a substantial interest in protecting consumers' privacy.[27/] As the Commission has explained, "CPNI includes information that is extremely personal to customers… such as to whom, where, and when a customer places a call, as well as the type of service offerings to which the customer subscribes."[28/] It is this interest that the government seeks to advance with its CPNI rules, including the rule requiring carriers to obtain customer approval before using CPNI for purposes other than providing the telecommunications service from which the CPNI was derived.[29/] While section 222 and the CPNI rules also help promote telecommunications competition,[30/] the primary purpose of the customer approval requirement appears to be protecting consumer

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[25/] See Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) ("CPNI Order").

[26/] Id. at ¶ 43.

[27/] The Supreme Court has consistently held that protecting a customer's privacy is a substantial government interest. See Edenfield v. Fane, 507 U.S. 761, 769 (1993); see also Florida Bar v. Went for It, 515 U.S. 618 (1995).

[28/] CPNI Order at ¶ 2.

[29/] Id. at ¶¶ 3, 43, 62; see also H.R. Rep. No. 102-204, at 90 (1995) (explaining that section 222 balances competing concerns, such as need for customers to be sure that personal information collected by carriers is not misused and expectation of customers that carriers will have all relevant information about customer's services when dealing with customer); 142 Cong. Rec. H1169 (daily ed. Feb. 1, 1996) (statement of Rep. Markey) ("[The conference report] contains expanded privacy protections for consumers.").

[30/] See H.R. Conf. Rep. 104-458, at 205 (1996) ("the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI.")

privacy.[31/] Because the government has a substantial interest in regulating speech involving CPNI, the Commission's CPNI rules meet the first prong of the Central Hudson test.

In order for a restriction on commercial speech to withstand a constitutional challenge, the government must also "demonstrate … that its restriction will in fact alleviate [the identified harms] to a material degree . . . . This burden is not satisfied through mere speculation or conjecture."[32/] AWS agrees with the Commission that customers must have some control over how carriers use their personal information or their right to privacy will be harmed.[33/] Both opt in and opt out consent requirements ensure that customers can control the use and disclosure of their CPNI, thereby enabling them to alleviate the potential threat to privacy posed by unrestricted use of personal information. Both mechanisms therefore satisfy the second prong of the Central Hudson test.

However, the "opt in" approach fails the final prong of the Central Hudson test, which requires the restriction in question to be narrowly tailored, so that there is a reasonable fit between the means selected and the desired objective.[34/] In the context of commercial speech regulation, the Supreme Court has held that this test is nearly impossible to satisfy when less restrictive alternatives exist.[35/] As detailed above, requiring the use of an opt out approval mechanism allows the government to protect customers' privacy interests, but does so in a far less burdensome manner than opt in. The Commission cannot require carriers to obtain "opt in"

[31/] See U.S. West at 1236 (analyzing plain language of section 222 and finding that the sections in question reflect solely a concern for customer privacy).

[32/] See U.S. West at 1238, citing Edenfield v. Fane, 507 U.S. 761, 770-71(1993).

[33/] See CPNI Order at ¶¶ 3, 37, 53.

[34/] U.S. West at 1238, quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

[35/] See Central Hudson, 447 U.S. at 564 (noting that a government interest is unconstitutional when it could be served as well by a more limited restriction on commercial speech).

consent when there is a "substantially less restrictive alternative" that achieves the same benefits.[36/]

III. THE COMMISSION'S TOTAL SERVICE APPROACH CONTINUES TO BE VALID AND USE OF AN OPT OUT APPROVAL MECHANISM IS CONSISTENT WITH THAT APPROACH

Section 222 defines the circumstances under which customer approval is needed for the use or disclosure of CPNI. In particular, subsection (c)(1) permits a carrier to use CPNI without customer approval to provide the telecommunications service from which the CPNI is derived and services necessary to or used in the provision of that telecommunications service.[37/] The Commission has implemented this requirement by adopting a "total service" approach to the use of CPNI. Under the total service approach, a customer is deemed to have consented to the carrier's use of CPNI to provide the service to which the customer subscribes as well as related services and customer premises equipment.[38/] The carrier must obtain the customer's approval in order to use the customer's CPNI to market other services to the customer. As currently defined by the Commission, AWS believes that the total service approach is a reasonable interpretation of section 222(c)(1).

The Commission asks, however, if adopting an opt out consent mechanism would be consistent with the continued use of the total service approach.[39/] The Commission is concerned

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[36/] Id.

[37/] 47 U.S.C. § 222(c)(1).

[38/] CPNI Order at ¶¶ 73-79; Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 at ¶¶ (1999) (finding that all carriers may use CPNI, without customer approval, to market CPE, and CMRS carriers may use CPNI, without customer approval, to market all information services) ("CPNI Reconsideration Order").

[39/] Further Notice at ¶ 21.

that permitting carriers to use an opt out consent mechanism in a "total service" environment could have an unfavorable effect on competition by making it easier for carriers to utilize CPNI to market new services to existing customers.[40/] But requiring all telecommunications carriers to use the more burdensome opt in consent mechanism in order to decrease the likelihood that customers will approve the use of their CPNI -- thereby decreasing all marketing of new services to consumers -- is a very indirect and overly broad means of addressing competitive concerns. For example, the Commission has recognized the highly competitive nature of the CMRS market[41/] and has expressed its preference that the competitive market, rather than government regulation, govern the CMRS industry.[42/] If the Commission believes that certain carriers that provide service in non-competitive markets or control bottleneck facilities need to be subject to additional restrictions on their use of CPNI, it should address such concerns in a more narrowly tailored and focused manner, rather than imposing such restrictions on all telecommunications carriers.[43/] In this specific situation, the Commission's interest in promoting competition may

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[40/] Id.

[41/] In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report at 3-5 (rel. July 17, 2001) ("Sixth CMRS Report").

[42/] See, e.g., Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, 14 FCC Rcd 19898 at ¶ 9 (1999); Kenneth Kiefer v. Paging Network, File No. EB-00-TC-F-002, Memorandum Opinion and Order, FCC 01-309 at ¶¶ 6-7 (Oct. 18, 2001).

[43/] See, e.g., Amendment of the Commissions Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, 97-352, Report and Order, 12 FCC Rcd 15668 (1997) (requiring incumbent local exchange carriers to provide in-region broadband CMRS through a separate affiliate); Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 at ¶ 444 (1999) (requiring SBC/Ameritech to provide advanced services through a separate affiliate); Rules and Policies on

justify the imposition on these particular carriers of the additional burdens associated with an opt in mechanism and therefore satisfy the requirements of Central Hudson.

Foreign Participation in the U.S. Telecommunications Market, IB Docket Nos. 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 at ¶ 221 (1997) (adopting narrowly tailored dominant carrier framework to address specific concerns of anticompetitive behavior).

CONCLUSION

For the reasons set forth above, the Commission should permit carriers to use an "opt out" mechanism to obtain customer approval to use CPNI to provide telecommunications services other than those from which the CPNI is derived.

Respectfully submitted,

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* Admitted in Virginia Only.
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CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 1st day of November 2001, I caused copies of the foregoing "Comments of AT&T Wireless Services, Inc." to be sent to the following by either first class mail, postage prepaid, or by hand delivery (*):

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